

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE**

IN THE MATTER OF THE APPLICATION)	
OF CHESAPEAKE UTILITIES)	
CORPORATION REGARDING ITS)	
ACQUISITION AND CONVERSION)	PSC Docket No. 18-0933
OF PROPANE COMMUNITY GAS)	
SYSTEMS)	
(Filed June 29, 2018))	

**PUBLIC COMMENTS OF THE DELAWARE ASSOCIATION OF
ALTERNATIVE ENERGY PROVIDERS, THE MID-ATLANTIC
PROPANE GAS ASSOCIATION, AND THE MID-ATLANTIC
PETROLEUM DISTRIBUTORS ASSOCIATION ON THE APPLICATION
OF CHESAPEAKE UTILITIES CORPORATION REGARDING ITS
ACQUISITION AND CONVERSION OF
PROPANE COMMUNITY GAS SYSTEMS**

The Delaware Association of Alternative Energy Providers, the Mid-Atlantic Propane Gas Association, and the Mid-Atlantic Petroleum Distributors Association respectfully submit these public comments on the Application of Chesapeake Utilities Corporation (“CUC”) Regarding Its Acquisition and Conversion of Propane Community Gas Systems.

On July 24, 2018, the Commission entered Order No. 9254 to commence proceedings in this docket. In Order No. 9254, the Commission stated its intention to accept written comments, particularly comments raising significant issues. The

public notice of this proceeding contained the same invitation for “interested persons” to submit written comments. The comments below raise the significant issue of whether the Commission has subject matter jurisdiction over CUC’s application.

The names and addresses of the parties providing these public comments are as follows:

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The DAAEP is an association of the State of Delaware with members who provide propane and propane service in Delaware. The MAPGA is an association of the State of Delaware with members who provide propane and propane service in Delaware. The MAPDA is an association of the State of Maryland with members who provide propane, heating oil, and gasoline in Delaware.¹ These Associations are “interested persons” for several reasons, most importantly because their members are propane providers and CUC contends that the Commission may assert jurisdiction over propane providers and regulate their propane rates and distribution systems, even though Delaware law does not grant the Commission such authority.

A. CUC’s Application Should Be Dismissed Because It Is Beyond the Commission’s Subject Matter Jurisdiction.

The powers of the Public Service Commission are wholly statutory. *Smith v. Delaware Coach Co.*, 70 A.2d 257, 261 (Del. Ch. 1949). If the Commission exceeds its authority, it acts without jurisdiction and its orders are of no effect and are subject to collateral attack. *Id.*

CUC admits that, under the statutes which define the Commission’s jurisdiction, the Commission does not have subject matter jurisdiction over propane providers, because they are not public utilities. CUC also concedes that

¹ The same Associations have filed a Petition to Intervene, which will be presented to the Commission.

the Commission has no authority over its affiliate, Sharp Energy, Inc., and its more than forty community propane gas systems. CUC nevertheless argues that the Commission automatically acquires jurisdiction over the very same forty-plus systems, and can regulate the propane rates and the systems for years, if CUC merely asserts that it intends to convert Sharp Energy's forty-plus propane systems to natural gas. In short, CUC contends that the Commission's jurisdiction over propane providers and propane rates is not governed by the express provisions of Delaware statutory law, but rather by CUC's own statements about its corporate intent to convert those systems over an unspecified period of time, a process which obviously could occupy many years.

In its application, CUC asserts that it has already converted three community propane gas systems to natural gas in Delaware over the last three years. *See* Direct Testimony of Christopher Redd, p. 3. If that is the case, then, applying CUC's jurisdiction argument, the Commission should have acquired jurisdiction over those three propane systems at the time CUC decided to convert the systems from propane to natural gas. Yet, CUC did not make an application to the Commission to convert those systems, and proceeded without notice to the Commission. If the Commission truly has jurisdiction over propane systems, their conversion to natural gas, and the rates charged for propane use during the conversion period, CUC's conduct raises the question whether its past conduct

violated Delaware public utility law. We submit, however, that CUC's past conduct is simply a tacit acknowledgment that the Commission lacks jurisdiction over CUC's pending application.

CUC's jurisdiction argument cannot be correct, because its application leads to absurd results. *Chase Alexa, LLC v. Kent County Levy Court*, 991 A.2d 1148, 1152 (Del. 2010) (Statutes must be construed to avoid absurd results.). For example, under CUC's theory of jurisdiction, if its pending application were granted, and one year later CUC decided that it no longer wished to convert twenty of the Sharp Energy propane systems to natural gas, the Commission would lose jurisdiction over those twenty systems, not because of any change in Delaware law or the systems themselves, but simply because CUC changed its business strategy. Propane systems over which the Commission exercised jurisdiction one day, would be beyond its jurisdiction the next day. If one year thereafter, CUC reversed fields and decided that it wanted to convert the same twenty systems to natural gas, the Commission would suddenly have jurisdiction over them again, and without any change in Delaware law or the systems themselves.

Most important to the Associations providing these public comments, if CUC's argument is taken to its logical conclusion, whenever a propane provider unaffiliated with CUC makes the decision to convert a community propane gas system to natural gas, the Commission automatically acquires jurisdiction over that

propane provider and its previously unregulated propane rates and system. And if the propane provider then decided to abandon its conversion plan, the Commission would lose jurisdiction. This simply cannot be. The Commission's jurisdiction is determined by statute, not by the day-to-day decision-making of public utilities or private companies; which decisions themselves are subject to change.

Let's consider how CUC's theory of jurisdiction would be applied in this docket. If the Commission moved forward with CUC's application, and the proceedings did not go as CUC hopes, CUC could simply announce at a very late stage (even after a hearing before the Commission) that it had decided not to convert the Sharp Energy propane systems to natural gas. As CUC would have it, the Commission would immediately lose jurisdiction and the proceedings would have to be closed. Subject matter jurisdiction either exists or it does not. It cannot be conferred by participation in a legal proceeding, and a lack of subject matter jurisdiction can be raised by any party at any time. The absurdity of the CUC's position is evident. Logic dictates that the Commission's subject matter jurisdiction is not controlled by what could amount to the whims of a public utility.

CUC incorrectly argues that the Commission can assert jurisdiction over Sharp Energy's extensive community propane gas systems under Sections 201, 302, and 303 of Title 26. The statutes contain no language granting jurisdiction over propane providers.

CUC says that Commission has the power to assure that its natural gas customers are charged appropriate rates. However, the customers being served by its community propane gas systems are not natural gas customers, and the provision of propane to them is not subject to Commission jurisdiction, including the rates charged for propane. And that is precisely why CUC created its Sharp Energy affiliate to operate and maintain those propane systems. Obviously, if CUC attempted to include the cost of serving its Sharp Energy propane customers in the rates charged to its natural gas customers, the Commission could prevent it from doing so; not because the Commission has jurisdiction over propane providers, but because the Commission has jurisdiction over the rates charged to natural gas customers.

The same holds true for CUC's argument about Commission jurisdiction over propane distribution systems and equipment. CUC cannot include those system costs in rates to natural gas customers, because they are not being used to service those customers. The linchpin for jurisdiction over natural gas rates is the Commission's authority to regulate a natural gas utility and its natural gas distribution system, not an affiliated but unrelated propane system. And we note that, if CUC's argument was correct, it would lead to the absurd conclusion that CUC could include the cost of constructing new community propane gas systems

in its natural gas rate base, as long it stated its intention to convert the systems to natural gas in the future.

CUC argues that the Commission has jurisdiction over its application because it is good public policy. Setting aside the merits of the public policy debate over propane versus natural gas, the Commission cannot assert jurisdiction over a matter based on the conclusion that it may advance what the applicant considers to be good public policy. If that were the case, there would be no discernable statutory limit on the Commission's authority.

Taking CUC's public policy argument at face value, the record created by CUC demonstrates that it is wholly unnecessary for the Commission to assert jurisdiction over CUC's application. According to the direct testimony of CUC's Christopher Redd, the company has already completed the conversion of three Delaware community propane gas systems to natural gas. CUC can expand its natural gas system without asking the Commission to assert jurisdiction where none exists.

CUC next contends that the Commission has inherent power to regulate community propane gas systems because it regulates CUC's propane peak shaving facilities. CUC makes the flawed analogy that peak shaving facilities provide propane-based power on a temporary basis, and so the Commission necessarily has jurisdiction over any propane distribution system, provided that there is an intent to

use it on something less than a permanent basis. However, the Commission's jurisdiction over CUC's propane peak shaving facilities is proper because they are a necessary adjunct to serving its natural gas customers. Under Section 201 of Title 26:

The Commission shall have exclusive original supervision and regulation of all public utilities and also over their rates, property rights, equipment, facilities, service territories and franchises so far as may be necessary for the purpose of carrying out the provisions of this title.

The peak shaving facilities are necessary for the purpose of providing safe and efficient public utility service to CUC's natural gas customers, and thus subject to Commission regulation. The forty-plus Sharp Energy community propane gas systems will not be used to provide power to CUC's natural gas customers in times of peak demand.

CUC points out that the Commission does not lose and then later regain jurisdiction each time that it uses its peak shaving facilities. That is precisely the point that we are making. The Commission's jurisdiction does not turn on the alleged distinction between the temporary versus permanent provision of propane, as argued by CUC. It is based upon the Commission's express authority over natural gas utilities. CUC's temporal analogy is further flawed because its peak shaving facilities are not, in actuality, a temporary solution to meeting the peak demand for natural gas. CUC admits that those facilities have been in operation

for “over 30 years.” The facilities are a permanent solution to the peak demand needs of CUC’s natural gas customers.

CUC next cites the settlement in PSC Docket No. 15-1734, approved in Commission Order No. 8982, which permitted it to implement a Temporary Gas Tank Storage Program. The settlement stands more for the proposition that CUC cannot have natural gas customers subsidize any propane operations that it engages in, regardless of how minimal the scope or size. The settlement in no way determined that the Commission could exercise jurisdiction over the conversion of more than forty community propane gas systems serving thousands of propane customers.

CUC’s reliance on the few cases from other states that it was able to identify is misplaced. Public utility law is state-specific. For that very reason, arguments which seek to apply public utility decisions across state lines must be carefully scrutinized.

CUC cites *Re Columbia Gas of Maryland, Inc.*, 1990 WL 10702702 (Md. P.S.C. 1990). For purposes of this proceeding, the decision is noteworthy primarily because the Maryland Commission permitted Columbia Gas’s competitor, Potomac Edison, to intervene. Also noteworthy was Columbia Gas’s position, which is directly at odds with CUC’s position here, that the Maryland

Commission lacked jurisdiction over the rates to be charged to the system's propane customers, even on a temporary basis.

The Maryland Commission did conclude, incorrectly we submit, that it could assert jurisdiction over a propane distribution system on a temporary basis while Columbia worked to provide natural gas service. In reaching its conclusion, the Commission did not analyze relevant provisions of the Maryland Code or cite any legal precedent. The decision was based on a concern that to rule otherwise “would effectively neuter Commission authority over natural gas companies....” *Id.* at 4. The Commission's decision failed to take into account the argument offered by its Staff that the Commission need not assert jurisdiction over propane rates or propane systems in order to assure that natural gas customers were being charged proper rates. Instead, by using its acknowledged authority over natural gas rates, the Commission was already empowered to prevent Columbia from charging natural gas customers rates which subsidized propane customers or the expansion of service to those customers. The Staff pointedly argued that, given the Commission's established authority over natural gas rates, the Commission did not have to decide the issue of propane regulation. In short, the Commission could have determined the propriety of Columbia's natural gas rates without deciding whether it had jurisdiction over “temporary” propane rates or systems. We respectfully submit that the Delaware Commission should decline to follow the

Maryland decision because, under Delaware law, it lacks jurisdiction over the regulation of propane rates and propane systems, and there is no reason to rule otherwise.

In re Southern California Edison Co., 2004 WL 2961155 (Cal. P.S.C. 2004) does not advance CUC's position. The case did not involve the conversion of a propane distribution system to natural gas, but rather the substitution of propane for a fuel that was primarily butane with a mix of propane. That distinction aside, the California Commission noted that, in four prior cases, it had declined to exercise jurisdiction over a utility's all-propane service. *Id.* at 4. The Commission created an exception in *California Edison*, because the propane system was located on Catalina Island, and the public utility had a virtual monopoly over the provision of gas, water, and electric service to the island. The Commission did not discuss its jurisdictional authority under California statutes or case law. Instead, the Commission based its decision entirely upon its conclusion that it could assert jurisdiction because the Commission "was established to protect ratepayers from market power abuses associated with monopolies." *Id.* at 4. While the California Commission's intent to safeguard the interests of public utility customers is commendable, it is not a precedent that finds application in this Delaware proceeding. To state the obvious, CUC's application does not involve a public

utility's monopoly over the gas, water, and electric service to customers on an island. Unique facts make for unique legal decisions.

Next, CUC points to a tariff provision affecting two Virginia gas utilities, which provides for the temporary provision of propane in anticipation of the extension of natural gas facilities. No further information is provided. There is no attempt to explain how the temporary service of propane, quite possibly by stand-alone tanks to one or a handful of customers, equates to the conversion of forty-plus community propane gas systems serving a very large number of Sharp Energy customers. Whether the tariff provision is valid is subject to question, and apparently was never challenged. We note that the Virginia Supreme Court case cited by CUC, *Roanoke Gas Co. v. State Corporation Commission*, 234 S.E. 2d 302 (Va. 1977), holds that, while the purchase of propane to serve existing natural gas customers at peak times is regulated by the Commission, the purchase of any excess propane beyond that needed to meet the energy demands of those customers is beyond the Commission's jurisdiction. And the Court apparently agreed with the Virginia Commission's conclusion that the gas utility's bulk propane business was not subject to Commission regulation. *Id.* at 304.

Finally, CUC offers what it calls an "alternative path to jurisdiction." CUC says that, if the Commission concludes that it lacks subject matter jurisdiction over its application to regulate rates for "temporary propane service," it could

nevertheless allow the case to proceed. This is simply a further invitation to jurisdictional error. Delaware law does not allow CUC to roll its separate, unregulated propane service and distribution systems into its natural gas rates. The fact that the Commission has the power to prevent CUC from imposing propane system costs on its natural gas customers, does not mean that the Commission has the power to do the opposite, namely impose those costs on its natural gas customers. The Commission has jurisdiction to regulate natural gas utilities, not propane providers. If the Commission dismisses CUC's application for lack of jurisdiction, CUC cannot attempt to place its propose propane rates into effect, and this proceeding will be concluded.

Wherefore, the Delaware Association of Alternative Energy Providers, the Mid-Atlantic Propane Gas Association, and the Mid-Atlantic Petroleum Distributors Association respectfully submit that he Commission should dismiss CUC's application for lack of subject matter jurisdiction.

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Dated: October 31, 2018